

**United States Department of Labor
Employees' Compensation Appeals Board**

A.S., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
STATION JACKSONVILLE, Jacksonville, FL,
Employer**

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**Docket No. 17-0606
Issued: December 21, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 23, 2017 appellant filed a timely appeal from a September 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.²

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of compensation in the amount of \$9,367.45 because appellant concurrently received Social Security Administration (SSA) benefits for the period November 1, 2014 through May 28, 2016 while receiving FECA benefits; (2) whether OWCP properly found appellant at fault and thus not entitled to waiver of

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence as its jurisdiction is limited to the evidence that was before OWCP at the time it issued its final decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$100.00 every 28 days from appellant's continuing compensation.

On appeal appellant disagrees that he received an overpayment of compensation and that he was at fault for OWCP's errors.³

FACTUAL HISTORY

On November 1, 1999 appellant, then a 50-year-old custodial worker, injured his lower back while mopping. The traumatic injury claim (Form CA-1) was accepted for lumbar strain and expanded to include aggravation of degenerative disc disease, and major depressive disorder, secondary to the employment injury. Appellant stopped work, returned on March 27, 2000, and worked until August 15, 2000. He returned to work for a brief period in 2002. Appellant was placed on the periodic compensation rolls in January 2003.

By letter dated October 1, 2010, OWCP advised appellant that, as he was nearing age 62, the minimum age at which an individual is eligible to receive SSA retirement benefits, he was being notified that section 8116(d)(2) of FECA (5 U.S.C. § 8116(d)(2)) provided that compensation benefits would be reduced if a compensationner began receiving SSA retirement benefits based upon his or her age and federal service. OWCP further advised that failure to report receipt of such retirement benefits could result in an overpayment of compensation, which could be subject to recovery, and advised him to immediately contact his local district office so that the process of making any necessary adjustments to his compensation benefits could begin.

On October 8, 2010 appellant telephoned OWCP and related that he was receiving SSA disability benefits, not SSA retirement benefits.⁴

EN1032 forms signed by appellant on November 12, 2014 and November 17, 2015, indicated that he was receiving no SSA benefits.

On June 17, 2015 OWCP requested that SSA verify the type of benefits appellant was receiving and forwarded a FERS/SSA dual benefits calculation form. SSA returned the form on August 1, 2015, which verified that appellant's SSA disability benefits were converted to retirement benefits effective November 2014. SSA indicated that beginning in November 2014 appellant's SSA rate with FERS was \$1,451.00 and without FERS \$964.70. Beginning in December 2014, the SSA rate with FERS was \$1,475.60 and without FERS \$981.00, and beginning December 2015 the SSA rate with FERS was \$1,475.60 and without FERS \$981.00.⁵

³ In his appeal, appellant also discussed problems with his life insurance. The Board's jurisdiction is limited to reviewing final adverse decisions of OWCP issued under FECA within 180 days of filing an appeal. 20 C.F.R. §§ 501.2(c) and 501.3(e); *see J.B.*, Docket No. 09-2191 (issued May 14, 2010). The record before the Board does not contain an appealable decision regarding this matter.

⁴ Following an OWCP inquiry, on July 2, 2012 the Office of Personnel Management (OPM) informed OWCP that appellant was not in receipt of OPM retirement benefits. On January 12, 2014 OWCP suspended appellant's wage-loss compensation because he failed to submit a required EN1032 form. Appellant returned the form, and his FECA benefits were restored.

⁵ On March 31, 2016 OWCP administratively terminated an overpayment of compensation in the amount of \$49.28 that occurred because of nondeduction of optional life insurance.

OWCP calculated the FERS offset, indicating that for the period November 1 to 30, 2014 appellant's monthly offset was \$486.30 (\$1,450.00 - \$964.70) or \$448.89 every 28 days (which totaled \$480.95 offset). Effective December 1, 2014, the monthly offset was \$494.60 (\$1,475.60 - \$981.00) or \$456.55 every 28 days. For the period December 1, 2014 to May 28, 2016 (a period of 545 days), the total offset was \$8,886.49, which yielded an overpayment of \$9,367.45 (\$480.95 + \$8,886.49).

In correspondence dated June 30, 2016, OWCP notified appellant that, based on information provided by SSA regarding the amount of his SSA benefit attributable to federal service, his FECA benefits would be adjusted, effective May 29, 2016.

On June 30, 2016 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$9,367.45 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits, for the period November 1, 2014 through May 28, 2016 was based on credits earned while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. OWCP found appellant at fault because he accepted a payment that he knew or reasonably should have known was incorrect. Appellant was provided an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20). He was informed of the actions he could take and was allotted 30 days to respond.

In correspondence received by OWCP on July 19, 2016, appellant disagreed with the reduction of his FECA compensation by \$465.55 per payment. On August 3, 2016 appellant also noted his disagreement with the overpayment of \$9,367.45, maintaining that his SSA benefit was for disability. He asked for further explanation of the overpayment. Appellant did not return the overpayment action request or the overpayment questionnaire.

By letter dated August 11, 2016, a senior OWCP claims examiner informed appellant that she would like to conduct a conference call to discuss his concerns and asked that he call her within 20 days of the date of the letter to arrange a convenient time for the conference. Appellant telephoned OWCP on August 24 and 29, 2016 but was unable to reach the claims examiner. The claims examiner called appellant on September 15, 2016 and left a voice mail message for him to return her call. She again called appellant on September 21, 2016 and left a voice mail message for him to call her at 10:00 a.m. the next day. Appellant called at 11:09 a.m. She returned the call at 1:54 p.m. and left a voice mail message for him to call back by 3:00 p.m. that day. On September 27, 2016 appellant called at 6:56 a.m. and was advised that the claims examiner would return the call. The claims examiner called appellant, who again was not available. She left a message that she would be issuing a final overpayment decision.

By decision dated September 27, 2016, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$9,367.45. It explained that the overpayment occurred because a portion of appellant's SSA benefits from November 1, 2014 through May 28, 2016 was based on credits earned while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. OWCP noted that appellant turned 66 years of age in November 2014, and that SSA furnished information regarding his concurrent SSA benefit with and without FERS. It found appellant at fault because he accepted a payment that he knew or reasonably should have known were

incorrect. Repayment in the amount of \$100.00 was to be deducted each 28 days from appellant's continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁶ Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States.⁷

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.⁸ FECA Bulletin No. 97-9 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁹

Section 404.409 of SSA regulations provide that for individuals born from 1943 to 1954 full retirement age is 66 years.¹⁰

ANALYSIS -- ISSUE 1

The record supports that appellant received FECA wage-loss compensation beginning in 2003, and that he received SSA retirement benefits beginning in November 2014.¹¹ The portion of the SSA benefits appellant earned as a federal employee was part of his FERS retirement package, and the receipt of benefits concurrently under FECA and federal retirement benefits is a prohibited dual benefit.¹²

SSA notified OWCP of the applicable SSA compensation rates for appellant and dates of monthly SSA compensation beginning in November 2014. This included rates with and without FERS offset.

Appellant's FECA compensation was not offset by his SSA retirement benefits until May 29, 2016. Based on the rates provided by SSA, by decision dated September 27, 2016, OWCP properly calculated a prohibited dual benefit that appellant received from November 1,

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

⁹ FECA Bulletin No. 97-9 (issued February 3, 1997).

¹⁰ 20 C.F.R. § 404.409.

¹¹ The record indicates that appellant turned 66 in November 2014.

¹² *Supra* note 9.

2014 through May 28, 2016.¹³ This yielded an overpayment of compensation in the amount of \$9,367.45. The record includes an overpayment worksheet explaining the overpayment calculation.

The Board has reviewed OWCP's calculations of the dual benefit appellant received for the period November 1, 2014 through May 28, 2016 and finds that he received a dual benefit totaling \$9,367.45 for this period, thus creating an overpayment of compensation in that amount.¹⁴

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."¹⁵

Section 10.433(a) of OWCP regulations provides that OWCP:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits.... A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual)."¹⁶

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁷

¹³ *Supra* note 8.

¹⁴ *See I.H.*, Docket No. 15-1578 (issued November 19, 2015).

¹⁵ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

¹⁶ 20 C.F.R. § 10.433(a); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

¹⁷ 20 C.F.R. 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in the creation of the overpayment. OWCP based the fault finding under the third standard described, that appellant accepted a payment which he knew or should have known to be incorrect. In EN1032 forms signed by appellant on November 12, 2014 and November 17, 2015, he indicated that he was not receiving SSA benefits as part of an annuity for federal service. This was not an accurate statement as, by SSA records, he was in receipt of SSA retirement benefits effective November 1, 2014. EN1032 forms provide:

“PART D -- OTHER FEDERAL BENEFITS OR PAYMENTS”

* * *

“2. SSA Retirement Benefits. Report any benefits received from the SSA which you receive as part of an annuity under the FERS. DO NOT report any benefits received from the SSA on account of employment in the private sector.

“a. Do you receive benefits from the SSA as part of an annuity for federal service? Yes or No: _____”

The Board finds that appellant was aware that he was receiving SSA and FECA benefits simultaneously. He failed to report that he was receiving SSA benefits on the EN1032 forms he signed on November 11, 2014 and November 17, 2015. Based on the clear language of the forms which he knowingly signed, appellant failed to provide information he knew or should have known to be material and accepted payment he knew was incorrect. The Board thus finds that appellant was at fault in the creation of an overpayment of compensation for the period at issue.¹⁸

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP’s regulations provides that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship.¹⁹

ANALYSIS -- ISSUE 3

In the June 30, 2016 preliminary determination, OWCP provided appellant an overpayment action request and overpayment recovery questionnaire and informed him of the actions he should take, including the submission of financial information. Appellant did not submit a completed questionnaire or other financial information that OWCP requested prior to

¹⁸ V.E., Docket No. 15-340 (issued April 1, 2015).

¹⁹ 20 C.F.R. § 10.441; see *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

the issuance of the final September 27, 2016 overpayment decision. Although he disagreed with the overpayment finding in July 2016 correspondence, he did not submit an overpayment action request, a completed overpayment recovery questionnaire, or any financial information at any time. Prior to finalizing the overpayment decision, an OWCP claims examiner left several telephone messages for appellant, to which he did not timely respond.

The overpaid individual is responsible for providing information about income, expenses and assets as specified by OWCP.²⁰ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²¹ As appellant did not submit any financial information to OWCP as requested, the Board finds OWCP properly directed recovery at a rate of \$100.00 each 28 days from his continuing compensation.²²

²⁰ 20 C.F.R. § 10.438.

²¹ *Frederick Artters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Initial Overpayment Actions, *Debt Management*, Chapter 6.200.4.c (2) (June 2009).

²² *See supra* note 14.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$9,367.45, that he was at fault and not eligible for waiver of recovery and that OWCP properly required recovery of the overpayment by deducting \$100.00 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.²³

Issued: December 21, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²³ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.